Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 04()-1 OF 2010(P)
HASHIM YUSOFF, ABDULL HAMID EMBONGAND AHMAD MAAROP FCJJ
15 AUGUST 2012

Labour Law — Employment — Dismissal — Retrenchment of respondents — Respondents applied for reinstatement — Industrial Court ('IC') found retrenchment of respondents to be dismissals without just cause and excuse — Whether IC erred in its decision — Whether IC applied LIFO principle correctly — Industrial Relations Act 1967 s 20(3)

By a sale and purchase agreement ('the agreement') the assets and business of Dynacraft Sdn Bhd (DSB) were sold to Malaysia Pacific Industries Bhd ('MPI'). MPI transferred the assets and business to its subsidiary, Dynacraft Industries Sdn Bhd ('the appellant'). Pursuant to the agreement, DSB had informed its employees including the respondents that they would be offered continued employment with the appellant on the same term and conditions as their employment with DSB and that their services with DSB would count towards their years of service with the appellant. On its part, the appellant echoed and corroborated what was said by DSB about offers of continued employment of the respondents by the appellant. The respondents accepted the offer of continued employment. When the appellant's business was adversely affected by the economic downturn, it undertook a reorganisation of its operations. This resulted in a number of positions, including the positions of the respondents, becoming redundant. The appellant retrenched the redundant employees including the respondents. Following the retrenchment the respondents filed a claim for reinstatement under s 20 of the Industrial Relations Act on the grounds that the appellant had, inter alia, breached the LIFO or 'last in first out' principle. The Industrial Court ('the IC') found that the appellant by ignoring the respondent's past services with DSB had breached the LIFO rule. Thus, the IC held that the retrenchment of the respondents were dismissals without just cause and excuse. The appellant appealed against this decision, but the decision of the IC was upheld by the High Court and the Court of Appeal. The appellant obtained leave to appeal to this court. The appellant submitted that since DSB and the appellant were two separate legal entities, there were breaks in the service of the respondents and that their service with DSB could not be taken into account for the purpose of the LIFO principle. As such, the appellant contended that the respondents, who had only commenced employment with the appellant pursuant to the change in

ownership of DSB's business, were junior in service when compared with other employees who had served the appellant from its incorporation. In the circumstances the appellant claimed that it had applied the LIFO principle correctly by retrenching the respondents.

Held, dismissing the appeal with costs:

(1) The IC considered cl 6.4 of the agreement and found that apart from taking over and giving continued employment to the employees of DSB, the agreement also provided that the appellant should give those employees full credit for past service. According to the IC, there was a continuation of employment in the widest possible sense. After having considered the provision under cl 6.4 of the agreement, this court agreed with the findings and conclusion of the IC (see para 26).

(2) The letters from DSB and the appellant contained similar terms. The letters offered the respondents continued employment with the appellant on the same terms and conditions as enjoyed by them under DSB, and assured them that the period of their employment with DSB would be deemed to be employment with the appellant. In the circumstances it would be unconscionable for the appellant to ignore the respondents' years of service with DSB for the purpose of the LIFO principle (see para 29).

(3) This court could not find any reasons to disagree with the conclusion of the IC. In the circumstances of this case, the IC applied the LIFO principle correctly when it ruled that the respondents' period of service with an entirely separate legal entity should be taken into account for the application of the LIFO principle instead of the actual years of service of the respondents with the appellant (see paras 36–37).

[Bahasa Malaysia summary

Melalui perjanjian jual beli ('perjanjian tersebut') aset-aset dan perniagaan Dynacrat Sdn Bhd ('DSB') telah dijual kepada Malaysia Pacific Industries Bhd ('MPI'). MPI telah memindah aset-aset dan perniagaan tersebut kepada subsidiarinya, Dynacraft Industries Sdn Bhd ('perayu'). Menurut perjanjian tersebut, DSB telah memberitahu pekerja-pekerjanya termasuklah responden bahawa mereka akan menawarkan pekerjaan berterusan dengan perayu atas terma dan syarat sama seperti pekerjaan mereka dengan DSB dan bahawa perkhidmatan mereka dengan DSB akan dikira sekali dengan tahun perkhidmatan mereka dengan perayu. Di pihaknya, perayu menyatakan dan menyokong apa yang dikatakan oleh DSB berhubung tawaran-tawaran pekerjaan berterusan responden-responden oleh perayu tersebut. Responden-responden telah menerima tawaran pekerjaan berterusan itu. Apabila perniagaan perayu terjejas teruk oleh kemelesetan ekonomi, ia mengadakan penstrukturan semula operasi-operasinya. Ini mengakibatkan

sebilangan jawatan, termasuklah jawatan-jawatan responden-responden, menjadi lebihan. Perayu telah membuang kerja pekerja-pekerja lebihan tersebut termasuklah responden-responden. Berikutan pembuangan kerja tersebut responden-responden telah memfailkan pengembalian jawatan di bawah s 20 Akta Perhubungan Perusahaan 1967 atas alasan bahawa perayu telah, antara lain, melanggar prinsip LIFO 'last in first out'. Mahkamah Perusahaan ('MP') mendapati bahawa perayu yang tidak mengendahkan perkhidmatan lampau responden dengan DSB telah melanggar rukun LIFO. Oleh itu, MP memutuskan bahawa pembuangan kerja responden-responden merupakan pemecatan tanpa sebab dan alasan yang adil. Perayu telah merayu terhadap keputusan ini, tetapi keputusan MP dikekalkan oleh Mahkamah Tinggi dan Mahkamah Rayuan. Perayu telah memperoleh kebenaran untuk merayu ke mahkamah ini. Perayu berhujah bahawa memandangkan DSB dan perayu merupakan dua entiti berasingan, terdapat lompang dalam perkhidmatan responden-responden dan bahawa perkhidmatan mereka dengan DSB tidak boleh diambil kira bagi tujuan prinsip LIFO. Oleh itu, perayu menegaskan bahawa responden-responden, yang hanya memulakan pekerjaan dengan perayu berikutan pertukaran milikan perniagaan DSB, lebih baru dalam perkhidmatan jika dibandingkan dengan pekerja-pekerja lain yang telah berkhidmat dengan perayu sejak pemerbadanannya. Dalam keadaan berikut perayu mendakwa bahawa ia telah menggunapakai prinsip LIFO dengan betul apabila membuang kerja responden-responden.

Diputuskan, menolak rayuan dengan kos:

(1) MP telah mengambil kira fasal 6.4 perjanjian dan mendapati bahawa selain daripada mengambil alih dan memberikan pekerjaan berterusan kepada pekerja-pekerja DSB, perjanjian tersebut juga memperuntukkan bahawa perayu patut memberikan pekerja-pekerja pengiktirafan untuk perkhidmatan lampau mereka. Menurut MP, terdapat pekerjaan yang berterusan dalam maksud sebenar. Setelah meneliti peruntukan fasal 6.4 perjanjian tersebut, mahkamah ini bersetuju dengan penemuan-penemuan dan kesimpulan MP (lihat perenggan 26).

(2) Surat-surat daripada DSB dan perayu mengandungi terma yang sama. Surat-surat tersebut menawarkan responden-responden pekerjaan berterusan dengan perayu tersebut atas terma dan syarat sama seperti yang mereka nikmati di bawah DSB, dan menjamin mereka bahawa tempoh pekerjaan mereka dengan DSB akan dianggap pekerjaan dengan perayu. Dalam keadaan berikut adalah tidak wajar bagi perayu untuk tidak mengambil kira tempoh tahun perkhidmatan responden dengan DSB bagi tujuan prinsip LIFO tersebut (lihat perenggan 29).

(3) Mahkamah ini tidak menemui apa-apa alasan untuk tidak bersetuju dengan kesimpulan MP. Dalam keadaan kes ini, MP menggunapakai prinsip LIFO sewajarnya apabila ia memutuskan bahawa tempoh

perkhidmatan responden-responden dengan entiti sah yang berasingan patut diambil kira untuk pemakaian prinsip LIFO dan bukan tempoh tahun perkhidmatan sebenar responden-responden dengan perayu (lihat perenggan 36–37).] A

Notes B

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1037–1098.

Cases referred to

Assn of Planters v Industrial Tribunal [1962] 1 LLJ 491, HC (distd) C
Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361; [1999] 4 CLJ 155, CA (refd)
Firex Sdn Bhd v Cik Ng Shoo Waa [1990] 1 ILR 226 (refd)
International Paint Co Ltd v Cameron [1979] ICR 429 (distd)
Menara PanGlobal Sdn Bhd v Arokianathan Sivapiragasam [2006] MLJU 131; [2006] 2 CLJ 501, CA (refd) D
NJ Chavan v PD Sawarkar AIR 1958 Bombay 133, HC (folld)
Om Oil and Oil Seeds Exchange Ltd Delhi v Their Workmen 1966 AIR 1657, SC (refd)
Palmco Holdings Bhd v Commissioner of Labour & Anor [1986] 1 MLJ 492, SC (distd) E
Radtha d/o Raju & Ors v Dunlop Estates Bhd [1996] 1 MLJ 561 (not folld)
Swadesamitran Ltd v Their Workmen, 1960 (SC) 762, SC (refd)
Workmen of Sudder Workshop of Jorehaut Tea Co Ltd v The Management of Jorehaut Tea Co Ltd AIR 1980 SC 1454, SC (refd) F

Legislation referred to

Employment Act 1955 s 13
Employment (Termination and Lay-off Benefits) Regulations 1980 reg 8(2) G
Industrial Relations Act 1967 ss 20, 20(3), 30(5)

Appeal from: Civil Appeal No P–04–268–2006 (Court of Appeal, Putrajaya)

N Sivabalah (Suganthi Singam with him) (Shearn Delamore & Co) for the appellant.
Ajit Singh Jessy (Pravin Kaur Jessy with him) (Jessy & Co) for the respondent. H

Ahmad Maarop FCJ (delivering judgment of the court):

I

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of

Appeal which dismissed the appellant's appeal against the decision of the High Court dismissing the appellant's application for an order of certiorari to quash the Industrial Court award dated 26 August 2004 ('the 2004 award'). The 2004 award was made by the Industrial Court pursuant to a reference made under s 20(3) of the Industrial Relations Act 1967 ('IRA') arising out of the dismissals of Kamaruddin bin Kana Mohd Sharif and six others ('the respondents') by the appellant.

BACKGROUND FACTS

[2] The appellant was engaged in the manufacture of semiconductor lead frames which were components used in the manufacture of semiconductor integrated circuits. It was a subsidiary of Malaysia Pacific Industries Bhd ('MPI') and was part of the Hong Leong Group of companies. The appellant was formerly known as Exclusive Distinction Sdn Bhd and was incorporated on 16 June 1992. With effect from 30 August 1995, the appellant was given a manufacturing licence by the Ministry of International Trade and Industry ('MITI'). On 18 December 1995 the appellant changed its name from Exclusive Distinction Sdn Bhd to Dynacraft Industries Sdn Bhd (its present name).

[3] On 9 November 1995, a sale and purchase agreement ('the 1995 agreement') was executed between, among others, National Semiconductor Corp (a Delaware Corp), Dyna-craft Inc (a Californian Corp), Dynacraft Sdn Bhd ('DSB') and MPI. By this agreement the assets and business of DSB were sold to MPI but transferred to its subsidiary — the appellant.

[4] By letters dated 19 January 1996 DSB informed its employees including the respondents that with the sale of its assets and business to MPI, their employment with DSB would cease at midnight on 20 January 1996.

[5] By letters dated the same day (19 January 1996), the appellant made offers of continued employment to all employees including the respondents.

[6] The respondents accepted the offer of continued employment by the appellant.

[7] Since January 1998, the appellant's business was adversely affected by the economic downturn faced by the country and the world at large. There was a significant reduction in the business level of the appellant which affected its financial position. The appellant undertook a number of measures to reduce its operating costs. Despite the various cost-cutting measures the appellant continued to suffer losses. It had no alternative but to undertake a reorganisation and rationalisation of its operations. This resulted in a number

of positions becoming redundant. The appellant claimed that 19 employees became redundant. The respondents were among them. By letters dated 17 July 1998, the appellant retrenched the redundant employees including the respondents with effect from 20 July 1998.

[8] The respondents were paid the following:

(a) salary up to 20 July 1998;

(b) salary in lieu of balance of annual leave not taken;

(c) variable incentive bonus — second half FY 98;

(d) pro-rated bonus for 1998;

(e) salary in lieu of notice; and

(f) termination benefits of 20 day's salary for each year of service, subject to cap of six year service.

[9] Following the retrenchment, the respondents filed a claim for reinstatement under s 20 of the IRA. On the evidence before him, the learned chairman of the Industrial Court found that there was a basis for the appellant's reorganisation of its operation and to take cost cutting measures including shedding of its workforce.

[10] However, the Industrial Court found that in the circumstances of this case, the application of the LIFO rule necessitated due consideration of the respondent's past services with DSB, and that since the appellant ignored such past services, it had breached the LIFO rule. The Industrial Court therefore held that the retrenchment of the respondents were dismissals and that the dismissals were without just cause and excuse.

[11] The decision of the Industrial Court was upheld by the High Court as well as the Court of Appeal.

[12] Leave to appeal to this court was granted to the appellant on the following questions:

(a) whether the Industrial Court applied the LIFO principle correctly when it ruled that the period of service of the respondents with an entirely separate legal entity should be taken into account for purposes of the application of the LIFO principle instead of the actual years of service of the respondents with the applicant; and

(b) does an offer of employment with recognition of previous years of service with a different entity have the effect in law of changing the actual date of employment of the respondents with the applicant?

A DECISION

[13] We will deal with the first question posed in this appeal. It concerns the correctness of the application of the LIFO principle by the Industrial Court. The LIFO (last in first out) or 'last come first go' principle requires the most junior employee to be retrenched before the more senior ones in the same category. The principle is intended to afford a healthy safeguard against discrimination of workmen in the matter of retrenchment (see *Swadesamitran Ltd v Their Workmen,* 1960 (SC) 762). Explaining this principle, in *Workmen of Sudder Workshop of Jorehaut Tea Co Ltd v The Management of Jorehaut Tea Co Ltd* AIR 1980 SC 1454, the Supreme Court said:

> The rule is that the employer shall retrench the workman who came last, first, popularly known as 'last come first go'.

[14] It is well established and accepted in industrial law that in effecting retrenchment, an employer should comply with the principle of last in first out unless there are some valid reasons for departure (see *Firex Sdn Bhd v Cik Ng Shoo Waa* [1990] 1 ILR 226). In *Om Oil and Oil Seeds Exchange Ltd Delhi v Their Workmen* 1966 AIR SC 1657, the Supreme Court said:

> (3) *It is an accepted principle of industrial law that in ordering retrenchment ordinarily the management should commence with the latest recruit, and progressively retrench employees higher up in the list of seniority.* But the rule is not immutable, and for valid reasons may be departed from. It was observed by this court in *Swadesamitran Ltd Madras v Their Workmen* 1960-1 Lab LJ 504: (AIR 1960 SC 762), that if a case for retrenchment is made out, it would normally be for the employer to decide which of the employees should be retrenched; but there can be no doubt that the ordinary industrial rule of retrenchment is 'first come, last go' and where other things are equal, this rule has to be followed by the employer in effecting retrenchment.

[15] In the circumstances of this case can it be said that respondents were the workmen who came last or the latest recruits? Learned counsel for the appellant appeared to contend that the respondents were the workmen who came last.

[16] In challenging the Industrial Court's finding that the dismissals of the respondents were without just cause and excuse as being erroneous, learned counsel for the appellant contended that the manner of the application of the LIFO principle by the Industrial Court was wrong. In essence he regurgitated the points submitted on behalf of the appellant in the Industrial Court, the High Court and the Court of Appeal. He pointed out that the appellant was incorporated only on 16 June 1992 and acquired DSB's business only on 20 January 1996 pursuant to the 1995 agreement. However, according to him, the

respondents had alleged that they had joined the appellant on the following dates:

(a) Kamaruddin bin Kana Mohd Sharif — 25 June 1976;

(b) Chan Foo — 4 January 1993;

(c) Lee Mooi Khean — 22 January 1977;

(d) Chow Heng Khow — 29 February 1972;

(e) Tan Gin Choon — 1 June 1979;

(f) Khor Chuan Seng— 13 April 1981; and

(g) Ch'ng Beng Tatt — 3 July 1984.

[17] That, according to learned counsel would not have been possible as on those dates the appellant was not even in existence. The dates of commencement of employment as alleged by the respondents as aforesaid were in respect of their employment with DSB which was a different entity from the appellant, which learned counsel contended the Industrial Court failed to recognise. On those respective dates the respondents were all employed by DSB (which was never part of MPI or the Hong Leong Group of companies) until their services were terminated by DSB by letter dated 19 January 1996. Learned counsel argued that the court elected to ignore this salient and undisputed fact. According to learned counsel, the respondents only commenced employment with the appellant together with the other employees on 20 January 1996 pursuant to the change in ownership of DSB's business. Learned counsel contended that the recognition of the respondent's past services with DSB was for purposes of computing benefit and entitlement. It did not create and was not intended to artificially change the employment dates of the respondents. It was not intended to bypass those employees who had been in service with the appellant even before the offers of continued employment were extended to the respondents.

[18] Learned counsel submitted that the change in the ownership of DSB's business constituted a termination of employment by operation of law and as such the 'artificial' duration of service of the respondents with DSB could not be taken into account. In support of this proposition of law he relied on *Radtha d/o Raju & Ors v Dunlop Estates Bhd* [1996] 1 MLJ 561. However, according to the learned counsel, it was this artificial date of employment which had been accepted by the Industrial Court (and upheld by the High and the Court of Appeal) which imposed liability on the appellant. He argued that in essence the artificial dates of employment of the respondents were accepted as constituting actual service with the appellant although the actual duration of service was very much shorter. He contended that it was erroneous for the court to conclude that on the evidence the respondents never left the service of the

company that employed them from the day they were engaged until they were dismissed having regards to the letters of termination which were issued to them and offers of employment which were made to them. According to learned counsel, in reality the respondents had only been in employment with the appellant for approximately 2 1/2 years when they were retrenched. It was for this purpose that they were regarded as more junior in service in the employment of the appellant because the other employees had served the appellant from its incorporation and were not selected for retrenchment in adopting the LIFO principle. Learned counsel contended that to adopt the application of LIFO principle as advocated by the Industrial Court would mean that an employee who had served the appellant for a period of ten years would be retrenched in preference to an employee who had served a different employer for a period of 15 years but had accepted an offer of employment with the appellant with recognition of past years of service in a merger and acquisition situation but actually served the appellant for a period of only a year. Learned counsel cited *Palmco Holdings Bhd v Commissioner of Labour & Anor* [1986] 1 MLJ 492, where according to him the court concluded that the new employer could not be held liable for termination benefits in respect of the period of employment with the previous employer. Learned counsel submitted that by the same token, with regard to LIFO principle, it could only apply to the actual period of employment with the employer in question, and that past service with another employer could not be considered although the employer may have recognised the past service when offering continued employment.

[19] Continuing his submission, learned counsel said the LIFO principle mandated that in a retrenchment exercise, the employer has to take into account the duration of service of the employee in the category within the establishment which was undergoing a retrenchment exercise. In essence it required the employer to select the more junior employee in a particular category to be retrenched first. Learned counsel contended that in applying the LIFO principle, for the purpose of giving consideration to length of service, it was only the actual service with the employer and not service with another entity which was relevant. In support he quoted OP Malhotra in *The Law of Industrial Disputes,* Vol 2, (6th Ed), where the learned author said:

> The words 'last person to be employed in that category', *point to the actual date of employment of the retrenched workman.* This is illustrated by the decision of a Division Bench of the Kerala High Court in *Assn of Planters v Industrial Tribunal*. A workman, John, who was working as a head-clerk in an industrial establishment resigned from his job and his resignation was accepted by the employer. After a period of about four months, John was again re-employed and the period of break in his service was condoned under the terms of agreement. During the period of John's break in service, another clerk, George, was employed. Subsequently, on a question arising regarding the relative seniority in service of John and George, for the purpose of applying the principle of 'last come, first go', *it was held that John's service as against George's must be counted as from the date of his re-appointment.*

[20] Concluding his submission on this issue learned counsel contended that the retrenchment of the respondents was clearly not in breach of the LIFO principle because at the time of their retrenchment, the respondents were in the employment of the appellant for barely 2 1/2 years if the length of service was confined to that served with the appellant and not DSB.

[21] So, the thrust of the submission of the appellant was that DSB and the appellant were two separate legal entities, there were breaks in the service of the respondents and that their service with DSB could not be taken into account for the purpose of the LIFO principle. We cannot accept the submission of the appellant. As will be demonstrated shortly this is not a case simply of transfer of business from one entity to another. Here the transfer involved the taking over by the appellant of the assets and business of DSB coupled with the provision of continued employment of DSB's employees (including the respondents) with the appellant, whereby the period of employment of the respondents with DSB shall be deemed to be employment with the appellant. We are also of the view that none of the cases relied on by the appellant assists its case. *Radtha*'s case did not support learned counsel's submission that the change in the ownership of DSB's business constituted a termination of employment and as such the duration of the respondent's service with DSB could not be taken into account for the purpose of the LIFO principle. *Radtha*'s case had nothing to do with the application of the LIFO principle. In that case the employees claimed indemnity in lieu of notice of termination pursuant to s 13 of the Employment Act 1955. Whereas in the instant case, the respondents sought reinstatement under s 20 of the IRA. The facts in *Palmco* are also materially different from the facts of the instant case. In that case, Palmco had bought over the business of Casuarina Beach Hotel Penang. It was agreed, inter alia, that Palmco would offer employment to all existing employees of the hotel except five persons who had passed the retirement age and were relatives of the family who were the former owner of the hotel. The five persons applied to the Director of Labour for termination benefits but the hearing was adjourned to enable Palmco to challenge the vires of the Employment (Termination and Lay-off Benefits) Regulations 1980 under which the claims were made. The Supreme Court held that reg 8(2) of the said Regulations was ultra vires the Employment Act 1955 to the extent that it purported to impose a liability on persons in the situation of Palmco. The Supreme Court did not decide on the application of the LIFO principle. So, *Palmco* could not support learned counsel submission that the LIFO principle could only apply with regard to the actual period of employment with the employer concerned and that past service with another employer could not be considered although the employer concerned might have recognised the past service when offering continued employment.

[22] The facts of *Assn of Planters v Industrial Tribunal* [1962] 1 LLJ 491 referred to in *OP Malhotra's The Law of Industrial Dispute*, Vol 2, (5th Ed), are

materially different from the present case. In *Assn of Planters*, the workman John resigned from his job as a head-clerk, and was reemployed after about four months and the period of break in his service was condoned. So there was a break in John's service. During the period of the break in John's service, another clerk, George was employed. Unlike in the present case where there was no break in the respondents' service and there were offers of continued employment, John had actually resigned and left the service of the employer concerned but came back to be reemployed by the same employer. The significance of the break in John's service when he resigned from the appellant's service is clear from the judgment of Ansari CJ in that case:

> Assuming that both George and John had belonged to the same category of workmen in the establishment, one fails to understand how the latter, having regard to the break in employment, can be treated as the employee, who had entered the service earlier. The fact remains that his earlier engagement had terminated by the letter of resignation, a copy of which is exh P3. In that letter CK John clearly states that he resigns from the post of head clerk with effect from 1 June 1949 about which he had already given notice in his letter of 2 May 1949. The later appointment is on 1 October 1949, and the relevant extract of the order reads as follows:
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> > With reference to your letter of 13 September 1949, you are hereby re-appointed in your previous post on the same salary and dearness allowance which you were receiving when you left the service on 31 May 1949 … The break in service will be considered as absence on leave without pay. The re-appointment is with effect from 15 September 1949, ie, the date on which the chairman has confirmed his approval of your re-appointment.

[23] *International Paint Co v Cameron Ltd* [1979] ICR 429 cited by learned counsel in support of his submission also does not assist the appellant's case. From the judgment of the court the facts in that case are these. The employee Cameron was employed by the employers (International Paint Co) as a heavy goods vehicle driver. Cameron was dismissed on the ground of redundancy on 14 April 1978. It was accepted that the employers required to dismiss one driver and that the choice was between Cameron and another driver named Boyle. It was agreed between the employers and the union that the basis of selection for redundancy would be last in, first out (LIFO). Boyle's cumulative period of service was some 18 months longer than that of Cameron. Boyle had, however, a break in that service in 1974 when he left the employer's employment and went to work elsewhere for a period of four to five weeks. He did so because he was not satisfied with the rate of pay he was receiving from the employers. Shortly after he left, the employers granted a wage increase which made employment with them more attractive to Boyle. The employers had had difficulty in replacing Boyle and after the wage increase they invited him to return and he had done so on the basis that his employment would be treated as continuous. Cameron complained to an Industrial Tribunal which held that his dismissal was unfair. The employers' appeal to the Appeal Tribunal was

dismissed. It is therefore clear that the facts in that case are different from the facts in the instant case. Unlike in the instant case, in *International Paint Co*, Boyle left the employment of the employers and came back to be reemployed by the employers after a break of four to five weeks. In such a situation, when Boyle returned to the same employment at a later date, he was regarded as having started his appointment anew in any condition of selection for redundancy between him and Cameron. In this regard, delivering the judgment of the Employment Appeal Tribunal, Lord Mc Donald said:

> It was submitted that on the facts in this case the employers had not contravened any customary arrangement or agreed procedure. They had applied the recognised procedure of first in, last out and in view of their agreement with Mr Boyle that meant in his case that his service fell to be regarded as continuous. In our opinion the first in, last out principle in this context means literally what it says. What counts is length of continuous employment rather than cumulative periods of service. This is well recognised in industry and, subject to exceptions in particular cases, *an employee who leaves his employment and returns to the same employment at a later date is regarded as having started his appointment anew in any question of selection for redundancy between him and other employees.* This appears from the industrial tribunal case of *Dorrell v Engineering Developments (Farnborough) Ltd* [1975] IRLR 234. The other tribunal case of *Sudders v Prestige Group Ltd* [1975] IRLR 367 which was also cited to us we consider to be rather special.
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> It is of course always open to an employer to re-engage an employee who has left him for a period and returned on the basis that he will be regarded as having continuous service for such matters as the calculation of redundancy payments, etc. So long as this is confined to matters concerning only the employer and the employee it cannot be criticised. If however, the terms of the re-engagement are intended to modify well established and understood industrial procedures such as the first in, last out principle in selection for redundancy, that should be clearly spelt out. In our view it should be made known to the other members of staff who are likely to be involved. It involves a departure from the accepted procedure and in this case therefore the employee was selected in contravention of a procedure which had been agreed relating to in redundancy. Accordingly the dismissal falls to be regarded as unfair unless there were special reasons justifying a departure from the procedure.

[24] The significance of the period of the break in Boyle's service is also clear from His Lordship's judgment in that case:

> It was then argued on behalf of the employers that there were such special reasons in this case. These were that Mr Boyle had the greater cumulo service; that his period of absence was relatively short, ie four to five weeks; and that in any event the employers had agreed with him that his service would be treated as continuous. In the present case we are unable to hold that it has been so established. *The period of absence was not insignificant. It was brought about by Mr Boyle himself having left the employers' employment to obtain better terms elsewhere. There may be circumstances where a very brief period of absence would fall to be overlooked and would not amount to broken service, but we do not consider that these circumstances exist here.*

[25] In other words there could be a situation where a brief period of absence would be overlooked and would not amount to broken service. But such a situation did not arise in *Boyle*'s case. This brings us back to the facts of the instant case. In considering whether the appellant had complied with the LIFO rule, the Industrial Court first referred to the 1995 agreement. In the 1995 agreement 'Seller' refers to the National Semiconductor Group of Companies which includes DSB. 'Buyer' means MPI and the appellant is its subsidiary. Clause 6.4 is the provision relating to seller's employees. It provides as follows:

> 6.4 Seller's Employees
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> (a) Seller shall terminate the employment of, and Buyer shall, extend offers to hire as new employees effective as of the Closing Date, all of the existing employees of the Business (the Transferred Employees') at Seller's Facilities in Penang, Malaysia and Murrysville, Pennsylvania, and Seller's sales personnel and sales representatives in Taiwan, the Philippines, Singapore, Tempe, Arizona, Santa Clara, California and Austin, Texas, as listed on Schedule 6.4(A) hereto. Buyer shall offer the *Transferred Employees* employment on terms and conditions, including salary ' and benefits (and the expatriate compensation packages provided to those two (2) expatriate employees listed on Schedule 4.10(B) hereto), not less favourable in the aggregate that currently enjoyed by such employees, and shall take all steps necessary or appropriate, as advised in writing to the parties by labour counsel in Malaysia and Pennsylvania, in order to assure that *no constructive termination of any of the Transferred Employees will be deemed to have occurred* under any applicable Legal Requirements. National and Seller shall cooperate with Buyer and use their reasonable best efforts to assist Buyer in connection with the hiring of the *Transferred Employees*. Buyer shall act in accordance with all applicable Legal Requirements in hiring the *Transferred Employees*, and, pursuant to Section 10.3(b) (iv) hereof, shall be solely responsible for any liability (including severance payments and other benefits) arising from, or in connection with, its practices in contacting, interviewing, evaluating, hiring and/or failing or delaying to hire the *Transferred Employees*, including, but not limited to liability for age, race, gender or other legally prohibited discrimination and violations of the Americans with Disabilities Act. *Buyer shall not materially adversely alter the terms of employment or reduce the salary or other employment benefits, of any of the Transferred Employees for the first twelve (12) months after the closing: provided that Buyer shall be entitled to terminate such employees for cause or as a result of a reduction in force subject to the provision of notice and severance payments not less favourable than that provided under current Seller policies.* Notwithstanding the provisions of this Section 6.4(a), Buyer shall be entitled to amend existing employee benefit plans, and thereby alter the benefits provided to *Transferred Employees*, to the extent that such amendments are mandated by changes in applicable Legal Requirements.
>
> (b) Except for National's reimbursement obligations as set forth in Section 10.7(b) hereof, Buyer shall bear all responsibilities for the *Transferred*

Employees, including the cost of any redundancies, retrenchments or terminations done by, or at the request of, Buyer, the cost of all employment-related obligations and employee benefits accruing after the Closing Date, and the cost of workers' compensation and similar employee claims made after the closing.

(c) Within 30 days after the closing, seller shall provide Buyer with a list of all vacation time accrued by the Transferred Employees as of the closing (the 'Vacation Time'). Buyer shall bear the cost of all Vacation Time and shall indemnify National and Seller for Claims by the *Transferred Employees* relating to such amounts. Schedule 6.4(C) lists all bonuses deferred by the *Transferred Employees* under the KEIP Bonus Deferral Program (the 'Deferred Bonuses'). National shall pay the Deferred Bonuses to the *Transferred Employees* in accordance with the terms of the KEIP Bonus Deferral Program.

(d) Buyer shall adopt new, or amend its existing, employee benefit plans (collectively, 'Buyer's Plans') to the extent necessary to provide benefits to the *Transferred Employees* with are substantially similar to, or of comparable economic benefit to, the benefits provided under the U.S. Employee Plans listed on Schedule 4.15 hereto. *Buyer shall ensure that Buyer's Plans give the Transferred Employees full credit for past service credited under the U.S. Employee Plans as of the Closing Date.* Promptly after the Closing, Buyer shall arrange for its retirement plan to accept a transfer of all assets and liabilities attributable to the Transferred Employees under the National Semiconductor Corporation Retirement and Savings Program in accordance with the requirements of ERISA, the Code and the terms of the National Semiconductor Corporation Retirement and Saving Program, and National shall arrange to make such transfer of such assets and liabilities, at the option of the *Transferred Employees*, to the extent permitted by the National Semiconductor Corporation Retirement and Savings Program, as soon as practicable after the Closing. In order to permit the Transferred Employees to begin participating in the Buyer's Plans with minimal disruption in coverage, the Buyer agrees to waive all pre-existing conditions and waiting period restrictions contained in its welfare benefit plans (as defined in section 3(1) of ERISA) to the extent such restrictions would otherwise apply to Transferred Employees and their dependents.

[26] Having considered cl 6.4 of the 1995 agreement, the Industrial Court found that apart from taking over and giving continued employment to the seller's employees, the agreement also provided that the buyer shall give those employees full credit for past service. The Industrial Court also found that for period of one year the buyer was prohibited from adversely altering the terms of employment, or reducing the salaries or other employment benefits due to those employees, and that the 1995 agreement envisaged a one year period of transition for the transfer of the employees from the seller to the buyer and that it was not as if the respondents ceased employment with DSB on 19 January

1996 and begin a new employment with the appellant on 20 January 1996. According to the Industrial Court, that was a continuation of employment in the widest possible sense. The Industrial Court construed the words 'other employment benefits' in cl 6.4 of the 1995 agreement to include benefits that follow in tandem with seniority in terms of years of service. Further, according to the Industrial Court, the appellant was the beneficiary of a readymade business and workforce enabling it to commence business operation immediately without having to hunt for manpower, and that in this regard, the respondents' years of service and experience with DSB stood the appellant in good stead. Having considered the provision under cl 6.4 of the 1995 agreement, we agree with the findings and conclusion of the Industrial Court as aforesaid.

[27] Then, the evidence established that pursuant to the 1995 agreement, by letters with similar contents dated 19 January 1996, DSB informed the respondents that their employment with DSB will cease on 20 January 1996 and that the appellant must offer them continued employment on the same terms and conditions as their employment with DSB, and that their service with DSB will count towards their years of service with the appellant. The full content of the letter is as follows:

> As we have previously brought to your notice, the assets and business of the group have been sold to Malaysia Pacific Industries Berhad (MPI). With the sale, your employment with us will cease at midnight on 20 Jan 1996. According to the agreement with MPI, Dynacraft Industries Sdn. Bhd. *must offer you continued employment at the same terms and conditions as your current employment. Your years of service with us will count towards your years of service with Dynacraft Industries Sdn Bhd.*
>
> On behalf of National Semiconductor Corporation and the group, I wish to express our gratitude and appreciation for your past services and contributions and wish you continued success and prosperity with Dynacraft Industries Sdn. Bhd.

[28] On its part, the appellant echoed and corroborated what was said by DSB about offers of continued employment of the respondents by the appellant. In due performance of the 1995 agreement, by its letters containing similar terms headed 'OFFER OF CONTINUED EMPLOYMENT' dated 19 January 1996, the appellant offered the following to the respondents:

> We are pleased to *offer you continued employment upon completion of the agreement on the same terms and conditions as those enjoyed by you under Dynacraft Sdn. Bhd.,* Penang/Dynacraft Asia Pacific Sdn. Bhd., Penang. *Your period of employment with Dynacraft Sdn. Bhd.:* Penang/Dynacraft Asia Pacific Sdn. Bhd., Penang *shall be deemed to be continuous employment with us.*

[29] There is nothing in the letters or any other documents to qualify or limit

the extent of the offer. There was nothing to say or even hint that the offer was limited only for the purpose of computing benefits and entitlement such as leave entitlement as belatedly claimed by the appellant's first witness. In our view, the offer was clear, unequivocal and unmistakeable. It literally means what it says — the respondents were offered continued employment with the appellant and that the period of their employment with DSB shall be deemed to be continuous employment with the appellant. Further, as found by the Industrial Court (and in our view correctly) even the documents — retrenchment pay out summary for each of the respondents (in which the dates of hire of the respondents by DSB were stated as the dates of hire of the respective respondents by the appellant) show that the appellant fully recognised the dates the respondents commenced their employment with DSB. Assured by the appellant of continued employment with it on the same terms and conditions as enjoyed by them under DSB, and assured that the period of their employment with DSB shall be deemed to be employment with the appellant, the respondents accepted the offer made by the appellant in its letters dated 19 January 1996. In the circumstances as aforesaid was it conscionable for the appellant to ignore the respondents years of service with DSB for the purpose of the LIFO principle and consequently retrenched them? Was it fair and just for the appellant to say to the respondents that although we have promised you continued employment and that your period of employment with DSB shall be deemed to be continuous employment with us, for the purpose of LIFO principle that promise was not applicable? In our view the answers to those questions must be in the negative. In *OP Malhotra's The Law of Industrial Dispute*, (6th Ed), Vol 1, p 320 the learned author wrote:

> Continuity of Service: The right of an industrial workman to continue in his employment, has been jealously protected and safeguarded by industrial adjudication. It is one of the most vital and important terms or conditions of industrial employment. Even on the transfer of an undertaking, from one owner to another, its employees will continue to be entitled to all the rights and privileges' acquired by them, by reason of their past service, if (i) there is a continuity of service, and (ii) there is an identity of business.

[30] This is illustrated in *NJ Chavan v PD Sawarkar* AIR 1958 Bombay 133. The facts of the case as set out in the judgment of the court are these. The petitioners were employed in the Nishat Talkies, Poona. These Talkies were started about 15 years prior to the court decision and were originally owned by one Mr Kakde. Kakde sold it to one Mr Bhole. Mr Bhole could not pay the whole of the purchase price and he therefore mortgaged it to Kakde. Upon this mortgage Kakde obtained a decree for the sale of the mortgaged property. There was also a mortgage held by the Bank of Maharashtra on the same property and the bank obtained a decree against both Kakde and Bhole. The property was sold in execution of the decree and Kakde purchased the property at the auction. The bank filed an execution application against the

judgment-debtors and got one Shri Gowaikar appointed a receiver. The receiver took possession on the 22 February 1954. On the 11 October 1954 one Sapal M Tata entered into an agreement with the receiver for the supply of films for exhibition in this theatre. On the 27 January 1956 the receiver was discharged and on that very day he served notices of discharge on the employees of Nishat Talkies. On the 28 January 1956 Kakde gave a lease to Tata for ten years beginning from the 1 February 1956. On the 31 January 1956 Tata issued letters of appointment to the employees of the Nishat Talkies. The employees were paid by the receiver all their past dues and passed receipts in respect thereof. Thereafter on the 7 May 1956, 13 disputes raised by the employees were referred for adjudication by the Government of Bombay to the Industrial Tribunal. The reference was against the Nishat Talkies and the court receiver, but as the receiver had ceased to have any interest in the Nishat Talkies by reason of his discharge, the reference continued against the Nishat Talkies only. Kakde, as the owner of the Nishat Talkies, was made a party to the reference and appeared before the Industrial Tribunal and stated that as from the 1 February 1956 SM Tata was conducting the business and all the dues prior to that date had been paid to the employees. Tata was served with a notice by the Industrial Tribunal but did not appear in the proceedings.

One of the disputes, viz Dispute No 12, was 'Continuity of service: The Past services of every employee should be considered as continuous for all purposes'. This demand also affected other demands which were dependent upon the determination of the question of continuity of service. Regarding continuity of service the Tribunal rejected the demand. Consequently they also came to certain conclusions on other demands which were affected necessarily by the rejection of this demand. The main grievance on this petition was that in rejecting the demand for continuity of service there was an error apparent on the face of the record in the order passed by the Industrial Tribunal and that they have also erred in law in not having applied to the facts of this case law which was then well established. The court went on to consider what the position in law was where business changed hand from one management to another but the employees continue in the same business. The question was under such circumstances did the employees continue to enjoy the benefits that have accrued to them by reason of their past service when the business came into the hands of a new management or did they lose such benefits? After examining a number of authorities on the subject, the court concluded:

> 7. The principle the emerges from these decisions is that employees of a business continue to be entitled to all the rights and privileges acquired by them by reason of past services even after a transfer of business provided (1) there is continuity of service, and (2) there is identity of business.
>
> 8. By continuity of service is not meant necessarily legal continuity but only continuity in fact; that is the employees must continue to serve the business without a substantial break in service. Thus, if the transferor gives notice of termination of service and the transferee makes afresh appointment, this by itself, although it may

in law amount to a break in continuity, will not affect the continuity of service for the purpose of determining industrial relations. Nor does it constitute a break in service if a short time elapses between such termination of service by the transferor and appointment by the transferee (which are legal forms resorted to by the employer in an attempt to deprive the employees of the rights and privileges they have acquired by reason of past service) so long as the employees continue to serve the business even after the termination and before the re-employment.

9. Regarding identity, of business, what is required is that the same business, which was carried on by the transferor, must be carried on by the transferee.

[31] The court then considered the decision of the Industrial Tribunal in that case which had disposed of the dispute as to continuity of service in the following words:

From the short history that I have given above it will be noticed that Shri Tata has come on the scene only on 1 February 1956. All the past dues have been paid to the workmen. The services of the workmen were properly terminated by the receiver by the discharge notice dated 27 January 1956. There was break of four days in the service of the workmen. It is no doubt true that during these four days the theatre was not closed. All the same by a letter of appointment dated 31 January 1956 the workmen were appointed afresh by Shri Tata. These letters of appointment were accepted by the workmen without any objection. No one made a reservation in the acceptance of these letters of appointment by saying that their demand for a continuity of service from the time to Shri Bhole would be pressed before the Industrial Tribunal. Shri Tata did not accept the liabilities of the past owners of this theatre, and therefore, I agree with his advocate, Shri AT Joshi, that the workmen should be considered as having been appointed afresh as from 1 February 1956. The demand of the workmen for continuity of service has no force and is therefore rejected.

[32] The court held that that approach of the Industrial Tribunal was wrong and must be set aside:

With respect to the tribunal, it is plain that they have completely lost sight of the principles of law to be applied in determining the question of continuity of service. *They appear to have decided the matter reiving upon the doctrine of sanctity of contract. This doctrine governed the relations of employer and employees in the 19th century but is now obsolete: and it is the duty of an Industrial Court or tribunal to modify the contractual rights and obligations if it becomes necessary to do so in the light of industrial legislation and legal decisions relating thereto.* The whole approach of the Tribunal to the question is, with respect, wrong in law and thereby the decision of the Tribunal on this point is vitiated and must be set aside.

The question then arises as to whether we should send back the matter to the Tribunal to determine the question afresh in the light of our judgment. Ordinarily we would have adopted such a course; but in this particular case all the facts that are necessary for the determination of the question of continuity of service are admitted

> facts, they are facts on the record and, therefore, not only will it be possible for this court to determine the question but it would involve unnecessary delay and possibly further litigation if the matter was to be sent back for determination of this question. We, therefore, propose to determine the question ourselves on the facts which are admitted and on the basis of the deed of transfer which is before us. *Now, in the first instance although it is true that the receiver discharged the employees by a notice dated 27 January 1956 and Mr Tata reappointed them on the 31 January 1956, it is admitted that the theatre was not closed between these two days and the employees continued to serve. Therefore, although a situation was brought about in law of a termination of service on the 27 January and a reappointment of the 31 January, the rendering of service by the employees to the business itself was in no manner interrupted and the employees continued to serve at the theatre and the theatre earned profits. Therefore, within the ratio of the principles that we have set out above there was continuity of service and the first essential ingredient for the purpose of determining whether the past service of the employees should be taken into account for all purposes is therefore, satisfied.*

[33] The court then considered the second ingredient — the identity of business and held that:

> We next proceed to consider the second ingredient, namely, the identity of business … *Taking all these terms collectively, there is not the least doubt that the object of the lease was to enable the lessee to continue the same cinema business which the lessor was carrying on in the same premises with the same machinery and equipment with the same* licences and with the same staff. We can *hardly imagine a stronger case* of identity of business. All that has happened is a change of beneficial interest in the business. Therefore, we have here clearly a case of a transfer of business where the *identity of business has remained the same and the staff has continued to serve the business. In such a case it is clear to our minds that the employees continue to enjoy the same rights and privileges that they had acquired by reason of past services to the said business. In our opinion, therefore, demand No 12 'Continuity of service: The past services of every employee should* be considered as *continuous for all purposes*' should have been *allowed and we accordingly* modify the award of the tribunal.

[34] Admittedly the court in that case did not rule on LIFO. However, we find that its decision that employees of a business continue to be entitled to all the rights and privileges acquired by them by reason of past service even after transfer of business provided that there was continuity of service and there was identity of business is illuminating and helpful in the consideration of the answer to the first question posed in the present appeal. Indeed, in our view the court's decision in the context of that case that 'past service of every employee should be considered as continuous for all purposes' neutralised the appellant's argument in the present appeal about 'artificial dates of employment'. Turning to the facts of the instant appeal, as found by the Industrial Court, on the evidence, the respondents had never left the service of DSB from the day they were engaged until their service with DSB ended. The transfer of DSB's

business did not alter the position of its employees including the respondents as only the ownership of business changed hands. In the words of the Court of Appeal in the present case:

> If the respondents are members of a ship's crew they never left the vessel. The new owner may put on board a new captain and/or crew or even change the name of the ship. But if he has to off-load some of the crew to overcome the rough seas, would it be conscionable and justified for him, applying the LIFO principle, to jettison the respondents instead of the ones who came aboard later?.

[35] Upon evaluation of the evidence, the Industrial Court held that:

> In these circumstances it is untenable for the company to say that when the claimants worked for Dynacraft Sdn Bhd the respondent company was not even in existence yet and therefore such earlier employment is to be ignored for LIFO reckoning. That, in the court's mind, is a technicality and this court is mandated to have regard, rather, to equity, good conscience and the substantial merits of the case. The fact remains, as stated earlier, that the company took over an ongoing business with its infrastructure, and workforce, already in place. In these circumstances the LIFO rule demands that the claimants' years with Dynacraft Sdn Bhd be taken into account.

[36] We cannot find any reason to disagree with that conclusion of the Industrial Court. In this regard s 30(5) of the IRA provides that the Industrial Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. In *Menara PanGlobal Sdn Bhd v Arokianathan Sivapiragasam* [2006] MLJU 131; [2006] 2 CLJ 501, in delivering the judgment of the Court of Appeal, Mohd Ghazali Yusoff JCA (later FCJ) said at p 522:

> In *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 4 CLJ 747, Gopal Sri Ram JCA delivering the judgment of the court said:
>
> > Further, s 30(5) of the (Industrial (sic) Relations) Act (1967) imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience.
>
> In *Nadarajah v Golf Resort (M) Bhd* [1992] 1 MLJ 506, Eusoff Chin J (as he then was) says at p 511:
>
> > It is therefore to be observed that in view of the provision of s 30(5) of the (Industrial Relations) Act (1967), the Industrial Court must act according to equity, good conscience and the substantial merits of the case *without* regard to technicalities and legal form. Technical rules such as estoppels, limitation, laches, acquiescence, etc (unless otherwise provided for in the Act) have no place in industrial adjudication and they should not be allowed to be invoked for defeating claims which are just and proper. (Emphasis added.)

A This passage was quoted with approval by the Supreme Court in *Kumpulan Peransang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11:

> From all these, it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.

[37] This brings us to the questions on which the leave to appeal in this case was granted. We find that the first question as framed is in general terms. It lacks the essential facts which are necessary for a definite 'Yes' or 'No' answer to be given. The essential facts established by the evidence in this case are that on the transfer of the business to the appellant, the respondents were offered continued employment with the appellant, that the period of the respondents' employment with DSB shall be deemed to be continuous employment with the appellant and that there was continuity of the respondents' employment in the sense explained earlier. We would therefore answer the question posed as follows. In the circumstances of this case particularly in light of the essential facts already stated, the Industrial Court applied the LIFO principle correctly when it ruled that the period of service of the respondents with an entirely separate legal entity should be taken into account for the purposes of the application of the LIFO principle instead of the actual years of service of the respondents with the appellant.

[38] In our view that answer to the first question would be sufficient to dispose of this appeal. We therefore find no necessity of answering the second question.

[39] There is another matter which we need to deal with. This concerns the appellant's submission in respect of the respondents Chow Heng Khow and Ch'ng Beng Tatt. Regarding these two respondents the thrust of the submission made on behalf of the appellant was as follows. The Industrial Court had found that because the LIFO principle was not adhered to, the retrenchment of all the respondents was without just cause and excuse. In so holding the court failed to consider that the LIFO principle had no application where there was only one person in a particular category. In the case of respondents Chow Heng Khow and Ch'ng Beng Tatt who were section managers, the unrebutted evidence was that there was no other person in such category. Despite this the court held that there had been a breach of LIFO principle without regard to the established authorities. In support of his submission learned counsel quoted the following passage from LC Malhotra in 'Dismissal, Discharge, Termination of Service &

Punishment (7th Ed)' which he pointed out was cited with approval in *Firex Sdn Bhd v Ng Shoo Waa* [1990] 1 ILR 226:

> But the rule of 'last come, first go' would have obviously no application to the case of retrenchment of the only employee in a particular category of workmen because in such a case it is retrenchment of the post itself and therefore, if for reasons of economy and any genuine interest of reorganisation the services of a single employee of a category have to be dismissed with, there is no scope for the application of this principle.

[40] Learned counsel submitted that thus, the court's blanket application of the LIFO principle even to the respondents Chow Heng Khow and Ch'ng Beng Tatt was perverse and unreasonable.

[41] We cannot accept that submission made on behalf of the appellant. As found by the learned High Court judge, the evidence of Chow Heng Khow and Ch'ng Beng Tatt were not challenged by the appellant. Chow Heng Khow's evidence shows that upon his dismissal, his job was taken over by Ann Lin (Cow 2). In respect of Ch'ng Beng Tatt, upon his dismissal his job functions were taken over by Bill Fulton assisted by the engineer YF Yap. Consequently, the Court of Appeal held (and in our view rightly) that with the unchallenged evidence of Chow Heng Khow and Ch'ng Beng Tatt that their respective jobs and workload were taken over by two other employees, and not eliminated or extinguished, redundancy was not proven, as mere reorganisation was insufficient to justify their retrenchment which was correctly held to be without just cause or excuse. In this regard in *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361; [1999] 4 CLJ 155, Shaik Daud JCA speaking for the Court of Appeal said at p 364 (MLJ), p 160 (CLJ):

> On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see *Chapman & Others v Goonvean & Rostawvack China Clay Co Ltd* [1983] 2 All ER). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

[42] In the result, for reasons which we have given we dismiss the appellant's appeal with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan